AN ANALYSIS OF FEDERAL ROLES RELATED TO OUTER CONTINENTAL SHELF DEVELOPMENT AND COASTAL ZONE MANAGEMENT

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INTRODUCTION

This report contains a discussion of the roles played by federal agencies in regard to the Outer Continental Shelf and Coastal Zone Management programs.

The report includes a summary of the historical background behind the state and federal assertions of jurisdiction over the Outer Continental Shelf, a discussion of the leasing process and the implications of exploration and development, an exploration of the Coastal Zone Management Act, a discussion of the roles played by federal agencies which are relevant to coastal zone management, an exploration of the consistency requirements found in the coastal zone statute, and an assessment of which federal agencies will play especially important roles.

OUTER CONTINENTAL SHELF

Historical background of federal-state conflict

In 1947, the United States Supreme Court held that the federal government has paramount rights in and power over the territorial sea, an incident to which is full dominion over the resources of the soil under that water area, including oil. [United States v. California, 332 U.S. 19, 38-39] (The territorial sea, or marginal belt, extends three nautical, or geographical, miles from a state's coastline. [United States v. Louisiana, 394 U.S. 11, rehearing denied 394 U.S. 994 decree supplemented 394 U.S. 836 (1969)]). The Court rejected the State of California's claim that the individual states owned the resources of the soil under the three-mile territorial belt as an incident to elements of sovereignty which they exercised in that water area [332 U.S., at 29], holding that the issue turned not on merely who owned the base legal title to the lands under the territorial sea, but on the two capacities under which the rights of the United States transcended those of a mere property owner: (1) the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean, and (2) its capacity as a member of the family of nations. [332 U.S.,

at 29]. The issue arose because California, acting pursuant to state statutes, but without authority from the United States, had negotiated and executed numerous leases with persons and corporations purporting to authorize them to take petroleum, gas, and other mineral deposits from lands underlying the territorial sea, and the lessees had done so, paying to California large sums of money in rents and royalties for the petroleum products taken. [33 U.S., at 23]. The United States requested as relief that the Court declare the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area.

The Court agreed with the position taken by the United States, and the ruling in that case and two similar ones, [United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950)], resulted in enactment of the Submerged Lands Act [43 U.S.C. 1301 et seq.] in 1953.

That Act released to the states any rights which the federal government had in the seabed underlying the territorial sea, subject to reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs. [43 U.S.C. at 1311, United States v. Maine, 420 U.S. 515, 525 (1975)]. Shortly thereafter, the Congress enacted the Outer Continental Shelf Lands Act [43 U.S.C. §1331 et seq.], discussed infra.

Passage of the Submerged Lands Act did not quiet state claims to lands beyond the three mile territorial sea. Although the Act relinquished to the coastal states the rights of the United States in lands beneath waters within a three mile limit, the Act also relinquished in excess of that limit all lands lying within state boundaries as they existed at the time a state became a member of the Union, or as approved by Congress prior to passage of the Act, within a limit of three leagues from the state's coastline. [43 U.S.C., at §1301(a)(2)]. (Nine nautical or geographical miles, or approximately 10 1/2 land miles comprise three marine leagues. United States v. Louisiana, 363 U.S. 1, fn. 6 (1960)]. The United States brought suit against Louisiana, Texas, Mississippi, Alabama and Florida seeking a declaration that the federal government was entitled to exclusive possession of, and full dominion and power over, the lands, minerals, and other natural resources underlying the waters of the Gulf of Mexico more than three geographical miles seaward from the coast of each state and extending to the edge of the Continental Shelf. [United States v. Louisiana, 354 U.S. 515 (1957), 363 U.S.1, 4-5 (1960)]. The Supreme Court ruled that for the purposes of the Submerged Lands Act: (1) Texas' maritime boundary had been established at three leagues from its coastline pursuant to a Joint Resolution of Congress on March 1, 1845 (5 Stat. 797) which provided for the annexation of Texas [363 U.S., at

64]; (2) the States of Louisiana, Mississippi and Alabama were entitled to submerged-land rights to a distance no greater than three miles from their coastlines [363 U.S., at 79, 82]; and (3) the State of Florida was entitled to submerged-land rights in lands extending "three leagues from the mainland" pursuant to congressional approval given to boundary provisions contained within the Florida Constitution, in post civil war times. [United States v. Florida, 363 U.S. 121 (1960)].

Five years later, the Court interpreted the Submerged Lands Act as it applied to Pacific states, and held inter alia, that: (1) regardless of those states' claimed historic boundaries, the Act granted to them only those submerged lands shoreward of a line three geographic miles from the seaward limit of "inland waters" [United States v. California, 381 U.S. 139, 148 (1965)]; (2) "inland waters" is a term defined by the judiciary, in accord with the intent of Congress, to conform with the Convention on the Territorial Sea and the Contiguous Zone [2 U.S.T. 1606, T.I.A.S. No. 5639, (1964) to which the United States is a signatory and which has been ratified by the requisite number of nations so that the Convention has the force of international law [381 U.S., at 150]; and (3) states are bound by the decision of the United States government not to use the "straight baseline method" of delineating inland waters permitted by the Convention, supra, which would have allowed California to

exercise jurisdiction over a larger area than does the method adopted by the United States government (also pursuant to the terms of the Convention) and thus states must adhere to United States interpretation of the Convention because of the ramifications generated within the international arena [381 U.S., at 167].

A supplemental decree has clarified the location of the three mile limit within which California may exercise submerged-lands rights pursuant to the Submerged Lands Act [United States v. California, 382 U.S. 448 (1966)].

In United States v. Maine, supra, the United States filed a complaint against thirteen states (including New York) bordering on the Atlantic Ocean, alleging that the United States was entitled, to the exclusion of the states, to exercise sovereignty rights over the seabed and subsoil underlying the ocean, lying more than three miles seaward from the ordinary low water mark and from the outer limits of inland waters on the coast, extending seaward to the outer edge of the Continental Shelf, for the purpose of exploring the area and exploiting the natural resources. The Court held that earlier case law [California, supra, 332 U.S. 19, Louisiana, supra, 339 U.S. 699, and Texas, supra, 339 U.S. 707] controlled and that the United States, to the exclusion of the defendant states, had paramount rights to the seabed underlying the ocean beyond the three mile marginal or territorial sea.

These cases have in effect upheld the Presidential Proclamation of September 28, 1945, Exec. Order No. 2667, 10 Fed. Reg. 12303, 59 Stat. 884 (The Continental Shelf) that the United States has authority and jurisdiction over the natural resources of the subsoil and seabed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States, and are consistent with the Convention on the Continental Shelf [(1964), 15 U.S.T. Pt. 1, p.47]. The case law, Conventions, and Proclamation represent a rather rapid development in accepted doctrines of international law which had previously recognized that rights to the resources of the seabed beyond territorial waters could be obtained only by prescription (long enjoyment) or by actual exploitation (occupation). [Report of the Special Master, at 69, United States v. Maine, supra]. It is within this changing arena that the Outer Continental Shelf program of the United States is conducted.

Summary of major activities and issues

The major activities of the Outer Continental Shelf (OCS) program which affect New York State include the leasing of lands in the Mid-Atlantic and North Atlantic leasing areas of the Outer Continental Shelf area and the exploration and development of those sites for resource production. The main issues involved include: (1) resolution of the State's role in a leasing process which involves

federal land and which is therefore conducted by the federal government but which necessarily results in economic and environmental impacts to which the State must respond, and (2) protection of environmental, safety and navigational needs and coordination of those needs with the need to explore, produce and transport energy resources.

The Leasing Process

The Outer Continental Shelf Lands Act of 1953 [43 U.S.C. §1331 et seq.; hereinafter, "the Act"] gives major responsibility for leasing, exploration and development of OCS resources to the United States Department of Interior (DOI), although several other federal agencies are also involved. Within DOI, the Bureau of Land Management (BLM) administers the leasing provisions of the Act [43 CFR §3300.0-3]. BLM: (a) receives nominations and tracts to be included in a lease sale; (b) prepares an environmental impact statement (EIS) for each sale; (c) makes an economic, engineering and geological evaluation of tracts to be sold; (d) receives the bids and determines whether leases should be awarded to the highest bidders on individual tracts; (e) receives revenues from lease sales, and (f) grants rights of way for pipelines to transport oil and gas from OCS leases to shore [43 CFR Part 3300, 43 CFR Part 2883, House Ad Hoc Select Committee on the Outer Continental Shelf, Report on

Outer Continental Shelf Lands Act Amendments of 1976, H.R. Rep. 94-1084, 94th Cong. 2d sess. 52 (1976)].

The leasing process, in effect since enactment of the Act in 1953, does not provide for effective State involvement, and the Act itself provides for an exclusive federal role by failing to include any role for the states. The State's role in the leasing process is advisory only [43 CFR §3301.4], and that role results not from provisions in the Act but from provisions in the National Environmental Policy Act of 1969 [NEPA: 42 U.S.C. §4332(c)].

BLM is responsible for preparing the draft and final EIS required by NEPA during the leasing process [43 CFR §3301.4], but the environmental impact review process itself provides only a limited role for state and local agencies and the general public [40 CFR §1500.9] because the mandate of NEPA merely requires that federal agencies consider the environmental impact of major federal actions which significantly affect the quality of the human environment. [42 U.S.C. §4332(c), emphasis added]. In other words, the states and localities most heavily affected by federal leasing of offshore lands do not have an "environmental veto" over that leasing.

Even the limited role provided to states under NEPA has, on occasion, been abused, as shown in Suffolk County et al. v. Secretary of the Interior [_____ F Supp. _____, No. 75C 208 (February 17, 1977)], wherein the Court held

that NEPA had been violated in that the Secretary had: (1) ignored the practical effects of local governmental licensing, permitting and review powers, (2) failed to consider the environmental impact of specific probable pipeline routes from the Outer Continental Shelf, (3) overstated peak oil and gas production and significantly understated the cost of such production with the result that there was a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project, (4) failed to consider the possible impact of particular tract-selection choices on the feasibility and sites of pipelines, (5) failed to consider the alternatives of either excluding industry-preferred tracts, or including less highly desired tracts in the final sale offer because of related onshore impacts and developments, and (6) failed to consider the alternative of separating exploration from production leasing [Opinion, pp. 7-8]. Consequently, the court voided the Sale No. 40 leases [Opinion, p. 96].

Within the leasing process itself, BLM can provide an opportunity for future state and local involvement by incorporating within the leasing agreement stipulations and conditions necessary to protect the environment and all other resources, such special stipulations and conditions to be contained in the proposed notice of lease offer [43 CFR §3301.4]. In leases issued pursuant to the mid-Atlantic

leasing area, Stipulation 7 contains a requirement that lessees notify adjacent coastal states of plans for on-shore exploration bases, although the degree of detail required is not specified.

The leasing process prescribed by law includes the following: (1) BLM plats official leasing maps of areas of the Outer Continental Shelf conforming so far as practicable to the method of tract designation established by the adjoining states [43 CFR §3301.1]; (2) the United States Geological Survey [USGS] prepares a summary report which describes the general geology and potential mineral resources of the area [43 CFR §3301.2]; (3) BLM requests interested federal agencies to prepare reports describing to the extent known any other valuable resources contained within the general area and the potential effect of mineral operations upon the resources or upon the total environment [Id]; (4) prior to selecting tracts for oil and gas, sulphur, or other mineral leasing, BLM receives and considers nominations of tracts for the leasing of specific minerals in specified areas [43 CFR §3301.3], receives and considers "negative" nominations of tracts that are viewed by interested parties as being unsuitable for leasing at the time [43 CFR §3301.4], evaluates the potential effect of the leasing program on the total environment, aquatic resources, aesthetics, recreation and other resources in the entire area during exploration, development and operational phases [Id.], and <u>may</u> hold

public hearings and consult with state agencies, organizations, industries and individuals [Id; emphasis added]; (5) BLM prepares a draft EIS, may hold a public hearing on that draft EIS [40 CFR §1500.7(d)] and then prepares a final EIS [40 CFR §3301.4, 40 CFR Part 1500]; (6) the Secretary decides whether to hold a leasing sale [40 CFR §3301.4]; (7) BLM publishes the notice of lease offer in the Federal Register at least 30 days prior to the date of sale [43 CFR §3301.5]; (8) BLM offers specific tracts for lease by competitive sealed bidding [43 CFR §3302.1]; and (9) if it decides that leases are to be awarded, BLM awards them only to the highest qualified responsible bidder [43 CFR §3302.5]. Oil and gas leases are issued for terms of five years and so long thereafter as oil or gas may be produced from the leasehold in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon [43 CFR §3302.2].

Exploration and Development

Exploration and development of OCS resources is conducted under supervision of another unit within DOI, USGS. Exploration activity, including exploratory drilling after the lease sale, is conducted under authorization of permits issued by USGS [30 CFR §§250.34, 251.2(a), 251.3(i), 251.5]. (USGS requires separate permits for geological exploration for mineral resources, geophysical exploration for mineral

resources [30 CFR §251.5(a)], geological exploration for scientific research and geophysical exploration for scientific research [30 CFR §251.5(b)(1)], for drilling [30 CFR §250.34(1)] and a separate permit for geological and geophysical exploration for scientific research which involves the use of solid or liquid explosives or a deep stratographic test [30 CFR §251.5(b)], and for shallow test drilling [30 CFR §251.9].

Several other federal agencies also require lessees to obtain permits prior to conducting activities offshore: (1) the Environmental Protection Agency [EPA] issues permits pursuant to the Federal Water Quality Improvement Act [33 U.S.C. §§1251, 1311, 1314(b) and (c), 1316(b) and (c), 40 CFR Part 435] for discharges into navigable waters, and (2) the Army Corps of Engineers [Corps] issues permits pursuant to the Rivers and Harbors Act of 1899 [33 U.S.C. §401 et seq., 40 CFR §209.120, 43 U.S.C., §1333(g)] affecting obstructions to navigation in navigable waters. In addition, lessees must comply with United States Coast Guard regulations regarding aids to navigational safety [43 U.S.C. §1333, 14 U.S.C. §81, 33 CFR Part 67, 43 U.S.C. §1333(e)(1)].

In addition to issuing a variety of permits, USGS: (1) issues and enforces regulations in the form of OCS orders and notices covering operational safety; (2) approves post-lease exploration and development plans; (3) approves pipelines as part of field development; and (4) collects royalties [30 CFR Part 250].

Within the exploration and development process, several major issues arise: (1) navigational safety, (2) resource transportation, and (3) environmental protection.

Navigational Safety

The Coast Guard has responsibility for navigational safety which includes maintaining and posting aids to navigation [43 U.S.C. §1333, 33 CFR Part 140]. The Corps also plays a role in protecting navigational safety by regulating obstructions to navigation, supra.

Resource Transportation

The problems encountered in transporting OCS energy resources vary according to the nature of the particular resource to be transported, the economic and environmental advantages and disadvantages of transporting that resource via a particular mode, and the feasibility of utilizing that mode of transport under average weather conditions expected to be encountered within the area of the particular development rigs.

Tanker safety is regulated by the Coast Guard under the Ports and Waterways Safety Act of 1972 [33 U.S.S. §§1221-1227, 46 U.S.C. 391a, 33 CFR Part 157, 160, 46 CFR Parts 30-40] and rate schedules and licensing of common carrier tankers are supervised by the Federal Maritime Commission [46 CFR Parts 531, 536].

Regulation of pipelines on the Outer Continental Shelf is divided among a number of federal agencies, including DOI (USGS and BLM), the Department of Transportation (Coast Guard), the Department of Defense (Corps), the Federal Power Commission, and the Interstate Commerce Commission.

DOI is responsible for issuing rights-of-way for the construction of pipelines on the Outer Continental Shelf [43 U.S.C. §1334(c), 30 CFR §§250.18, 250.19, 43 CFR Part 2800].

Safety regulations for interstate pipelines handling gases and hazardous liquids are the responsibility of the Department of Transportation, [49 U.S.C. §§1671, 1672, 1655, 49 CFR Parts 191, 192, 195], although USGS enforces safety requirements on the platform [DOT-DOI Memorandum of Understanding, August 16, 1971].

The impact of pipelines on navigational safety is regulated by the Corps and the Coast Guard. The Corps issues permits for placement of obstructions to navigation, including platforms and associated structures as discussed supra, and the Coast Guard requires that aids to navigation be installed on obstructions to navigation, including such obstructions on the ocean bottom as pipelines [33 U.S.C. §§403, 409, 14 U.S.C. §§81, 86, 92, 633, 43 U.S.C. §1333, 33 CFR Part 64].

Regulation of interstate gas pipelines is the responsibility of the Federal Power Commission, both for siting [15 U.S.C. §§717f, 717o, 18 CFR Part 157] and for rate

regulation [15 U.S.C. §§717c, 717o, 18 CFR Part 154]. The Interstate Commerce Commission is not involved in siting oil pipelines, but is responsible for rate regulation [49 U.S.C. §1, 49 CFR Part 1300].

Siting and construction of a pipeline requires numerous federal permits: (1) pipeline dredging and/or installation necessitates the need for permits issued by the Corps under 33 U.S.C. §401 [construction of bridges, causeways, dams or dikes in navigable waters; 33 CFR §209.125], 33 U.S.C. §403 [obstruction or alteration of navigable waters; 33 CFR §209.120], 33 U.S.C. §404 [establishment of harbor lines, channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made; 33 CFR §209.120, 40 CFR §230 (dredged material)], 33 U.S.C. §407 [depositing of refuse in naviable waters; 33 CFR §209.131]; (2) clearance for pipelines rights-of-way through the Outer Continental Shelf is granted by DOI under 43 U.S.C. §1334(c) [BLM: pipeline rights-of-way for common carriers, 30 CFR §250.18, 30 CFR §250.19, 43 CFR §2800] [USGS: rights-of-way for "gathering lines", 30 CFR §250.18]; (3) oil and gas pipeline safety and design standards are promulgated and approved by the Department of Transportation's Office of Pipeline Safety [43 U.S.C. §1331, 49 U.S.C. §§1671-1672, 49 CFR Parts 190, 191, 192] in the Materials Transportation Bureau]; (4) the pipelines themselves are routed through submerged lands of the Outer Continental Shelf by DOI [USGS: 43 U.S.C. §1334(c),

49 CFR §250.19]; (5) the Federal Power Commission issues certificates of convenience and necessity in siting natural gas pipelines [15 U.S.C. §717f, 18 CFR Part 157]; (6) the Interstate Commerce Commission regulates the price of oil transported through pipelines [49 U.S.C. §1, 49 CFR Part 1300]; (7) The Federal Power Commission regulates the price of natural gas transported through pipelines [15 U.S.C. §§717c, 717o, 18 CFR Part 154]; and (8) the Coast Guard issues permits for the construction of deepwater ports [33 U.S.C. §1503(a), 33 CFR Parts 148-150].

The Department of Transportation has authority to establish procedures for the location, construction and operation of deepwater ports [33 U.S.C. §§1501-1524, 43 U.S.C. §1333, 33 CFR §§148-150]. Deepwater ports are oil transfer facilities located beyond the territorial sea and off the coast of the United States [33 U.S.C. §1502(10)].

Environmental Protection

The major environmental hazard posed by exploitation of OCS resources is that of oil pollution. A variety of federal statutes deal with the problem: (1) the Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1321, 33 CFR Parts 153, 154, 155, 156, (Coast Guard), 40 CFR Parts 110, 112, 113, 114 (EPA), and 40 CFR Part 1510 (Council on Environmental Quality]; (2) the OCS Lands Act of 1953, as amended, 43 U.S.C. §1331 et seq., 30 CFR §250.43, 33 CFR

Part 147; (3) the Ports and Waterways Safety Act of 1972 (33 U.S.C. §1224, 33 CFR Part 160); (4) the Deepwater Port Act of 1974 [33 U.S.C. §1501, 33 CFR Parts 149, 150]; and (5) the Oil Pollution Act of 1961, as amended, 33 U.S.C. §1001 et seq., 33 CFR Part 151).

The prevention of spills from platforms on the OCS is under the jurisdiction of USGS [30 CFR §§250.19, 250.43]. That agency requires the use of blowout prevention equipment [30 CFR §250.41], and preparation of an oil spill contingency plan and a description of all equipment and materials available to permittees constructing test drilling for use in containment and recovery of an oil spill, with a description of the capabilities of such equipment under different sea and weather conditions [30 CFR §251.9(b)(iii)].

The Coast Guard, which has general jurisdiction over ocean oil spill containment, cleanup and removal [33 U.S.C. §1321, 33 CFR Parts 153, 154, 155, 156, 40 CFR Part 1510], shares responsibility for spills occurring on OCS platforms with USGS. Under an August 16, 1971 Memorandum of Understanding between DOT and DOI, USGS has exclusive responsibility within 500 meters of the platform, and the Coast Guard has jurisdiction beyond that distance.

All oil spills must be recorded by the lessee, and those of a substantial size or quantity as defined by USGS which cannot be immediately controlled must be reported to

USGS, the Coast Guard, and the Federal Water Pollution Control Administration [30 CFR §250.43(a)].

Several statutes currently deal with liability for oil pollution, including the Water Pollution Control Act, supra, Deepwater Port Act, supra, the Limitation of Liability Act of 1851 [46 U.S.C. §183-189], and the OCS Lands Act supra. Generally, liability is imposed for cleanup costs, within certain limits, but not for damages. The Water Pollution Control Act, supra, imposes liability of up to $100 per gross ton or $14 million, whichever is lesser, for spills from vessels and up to $8 million for spills from onshore and offshore facilities, unless willful negligence or misconduct can be shown, and in that case liability is unlimited. The Deepwater Port Act, supra, sets higher limits ($150 per gross ton or $20 million for spills from ships in the safety zones set up pursuant to the Act, and $50 million for spills from the ports themselves). Both of the aforementioned statutes limit the defenses available to spillers, but the OCS Lands Act allows no defenses to be pleaded and makes lessees liable for all cleanup costs without limitation [43 U.S.C. §1334, 30 CFR §250.43]. In contrast, the Limitation of Liability Act, supra, limits liability resulting from spills emanating from vessels to the value of the vessel and freight then pending [46 U.S.C. §183], which, under appropriate circumstances, may be zero.

The Federal Maritime Commission is responsible for determining the financial responsibility of oil-carrying vessels operating in the oceans adjacent to the United States [33 U.S.C. §1321, 46 CFR Part 542]. This applies to carriers bringing oil or gas ashore by barge or tanker, and must be sufficient to meet the limits of liability imposed on vessels by the Water Pollution Control Act, supra [46 CFR §542.1].

None of the aforementioned statutes establish liability for damages, although common law remedies are available.

In addition to creating increased risk of oil pollution, OCS development and production increases the risk of other kinds of water pollution and air pollution. EPA is the federal agency primarily responsible for these concerns.

OCS-related facilities sited both on and offshore must follow certain effluent limitation guidelines and meet performance standards promulgated by EPA pursuant to the Water Pollution Control Act [33 U.S.C. §§1251, 1311, 1314(b) and (c), 1316(b) and (c), 1317(c), 40 CFR Part 435], and EPA National Pollutant Discharge Elimination System permits [NPDES] must be obtained before fixed platforms or structures may discharge pollutants in water beyond the territorial limits, pursuant to the Water Pollution Control Act [33 U.S.C. §402, 40 CFR Part 125]. The NPDES permits do not apply to (1) pollutants discharged into the contiguous zone by vessels [40 CFR §125.1(i)], or (2) water, gas or other

materials injected into wells to facilitate production, or water derived in association with oil or gas production and disposed of in a well [40 CFR §125.1(y)]. (The Coast Guard polices discharges from vessels [33 CFR Parts 151-159].) EPA requires non-transportation related facilities located either inland or within the territorial sea and which could reasonably be expected to discharge oil into navigable waters to develop Spill Prevention Containment and Countermeasure plans [SPCC: 33 U.S.C. §1251 et seq., 40 CFR Part 112], and regulates the dumping of radiological, chemical or biological warfare agents or high-level radioactive wastes into the territorial sea and into the contiguous zone (to the extent that it may affect the territorial sea or the United States) [33 U.S.C. §1411 et seq., 40 CFR Parts 220-230]. Dumping of any other material requires a permit from EPA as well, unless it involves dredged material, in which case the Corps issues the permit [40 CFR §220.1].

EPA's air pollution control responsibilities could have a major impact on onshore facilities such as refineries because that agency has promulgated national primary and secondary ambient air quality standards and requires that States develop air quality standards implementation plans designed to improve air quality [42 U.S.C. §§1857d, 1857d-1, 40 CFR Part 50-53].

COASTAL ZONE MANAGEMENT

The Statute

The Coastal Zone Management Act of 1972 [CZMA] establishes a system of annual planning and management grants for coastal states which plan and/or develop coastal zone management [CZM] programs consistent with the Act [16 U.S.C. §1451 et seq.]. Eligible states are to develop management programs which include: (1) an identification of the boundaries of the coastal zone subject to the management program; (2) a definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coatal waters; (3) an inventory and designation of areas of particular concern within the coastal zone; (4) an identification of the means by which the state proposes to exert control over these land uses and water uses; (5) broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority; (6) a description of the organizational structure proposed to implement such management programs, including the responsibilites and interrelationships of local, areawide, state, regional, and interstate agencies in the management process; (7) a definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological,

or cultural value; (8) a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including but not limited to, a process for anticipating and managing the impacts from such facilities; and (9) a planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

States with management programs approved by the Secretary of Commerce are reworded by having federal agencies conducting or supporting activities or undertaking development projects within the coastal zone be bound that their activities or projects are to the maximum extent feasible, consistent with the State's CZM program [16 U.S.C. §1456(c)]. As part of its CZM activities, the federal government, through the Secretary of Commerce, is directed to administer a coastal energy impact program [CEIP] which provides financial assistance to states and local governments being affected by specified activities involving energy development in the coastal zone [16 U.S.C. §1453(4)], and thus CEIP is designed, in part, to ease state and local burdens imposed by offshore activities. CEIP includes in addition, howver, other energy activities, such as: (1) transportation, conversion, treatment, transfer, or storage of liquified natural gas or (2) transportation, transfer or storage of

oil, natural gas or coal (including by means of a deepwater port) [16 U.S.C. §1453], in recognition of the fact that energy facilities are often sited in coastal area.

Federal Agencies Having a Significant Role in the Coastal Zone

The CZM program developed by any state is obviously likely to involve working with a variety of federal agencies, and the Office of Coastal Zone Management within the National Oceanic and Atmospheric Administration of the Department of Commerce has already determined that the following federal agencies are relevant to CZM programs developed in each state: the Departments of Agriculture, Commerce, Defense, Health Education and Welfare, Interior, Justice and Transportation, the Council on Environmental Quality, the Environmental Protection Agency, the Energy Research and Development Administration, the Nuclear Regulatory Commission, the Federal Energy Administration, the Federal Power Commission, and the General Services Administration [15 CFR §925.3(a)]. The roles federal agencies play become relevant to state CZM programs either because: (1) the federal agency exercises a regulatory jurisdiction which is relevant to regulated activities conducted within the coastal zone, or because (2) the mission of that federal agency either complements or conflicts with state interests or agencies within the coastal zone.

Department of Agriculture

The Soil Conservation Service (SCS) within the Department of Agriculture is responsible for developing and carrying out a national program of conservation of soil, water and related resources [16 U.S.C. §590 (a-f), 7 CFR §600.1]. Programs administered by SCS include basic soil and water conservation, watershed protection, flood prevention, cooperative river basin surveys and investigations, resource conservation and development, and others as assigned by the Secretary of Agriculture [Id.]. The mission of SCS is to provide national leadership in the conservation, development, and productive use of soil, water and related resources. Such leadership encompases soil, water, plant and wildlife conservation, small watershed protection and flood prevention; and resource conservation and development [Id.]. Integrated into these programs are erosion control, sediment reduction, pollution abatement, land use planning, multiple use, improvement of water quality, and several surveying and monitoring activities related to environmental improvement [7 CFR §601.1].

The Farmers Home Administration [FHA] was established by order of the Secretary of Agriculture on August 14, 1946 [11 Fed. Reg. 9007], and is responsible for the following programs within the Department of Agriculture: Loan and grant and other assistance programs, Rural Housing, Farm Operating, Farm Ownership, Soil and Water, Business and

Industrial, Watershed, Resource Conservation and Development, Comprehensive Area Plans, Water and Waste Disposal, and Community Facilties [7 CFR §1800.1].

The Forest Service [FS], under authority delegated by the Secretary of Agriculture, has broad responsibilities for providing leadership in forestry, for administering the National Forest System, for carrying out cooperative forestry programs, and for conducting research on problems involving protection, development, management, renewal and continuous use of all resources, products, values and services of forest lands [36 CFR §200.3].

Department of Commerce

The Economic Development Administration [EDA] is responsible for providing assistance in economically distressed areas and regions in order to alleviate conditions of substantial and persistent unemployment and underemployment and to establish stable and diversified economies [13 CFR §301.1]. EDA provides grants, technical assistance, research and information as part of its programs [Id.].

The Federal Maritime Administration [FMA] is directly involved in facilitating transportation of waterborne commerce, port and cargo facility development, and the promotion of the U.S. Merchant Marine [46 CFR Parts 200-540]. In addition, the FMA enforces financial responsibility requirements imposed on vessels pursuant to oil spill

liability provisions in the Water Pollution Control Act [46 CFR Part 542].

The National Oceanic and Atmospheric Administration [NOAA] within the Department of Commerce has a variety of organizational elements which conduct programs relevant to CZM, including: the National Weather Service, the National Ocean Survey, the Environmental Research Laboratories, the National Marine Fisheries Service, and the Sea Grant Program [15 CFR §903.1]. In addition, the Associate Administrator for Coastal Zone Management has responsibility for administering the Coastal Zone Management Act [15 CFR §920.41], and will play an especially important rule in resolving State-federal conflicts within that Act [15 CFR §925]. NOAA gathers, processes, and issues information on weather conditions, river water height, structure and shape of ocean basins, seismic activity, the precise size and shape of the earth, and conditions of the upper atomosphere and space [15 CFR §907.1]. It issues warnings against hurricane, tornadoes, floods, and seismic seawaves to areas in danger [Id.]. NOAA also administers the Estuarine and Marine Sanctuaries programs [15 CFR Parts 921, 922].

The National Marine Fisheries Service within the Department of Commerce conducts biological research on commercially important species of fish, shellfish and mammals in United States waters and on the high seas [50 CFR §201.1] and conducts programs for the maintenance of inland

fisheries designed to develop the fisheries of the Great Lakes and inland waters in conjunction with the conservation and management of commercial fishery resources [Id.]. The Service provides funds for States to finance anadromous fishery resources for up to 50 percent of the cost of projects such as stream improvement and construction of fishways, spawning channels, hatcheries and research [Id.]. The Service also administers the permit systems created by the Endangered Species Act [61 U.S.C. §§1531-1543] and the Marine Mammal Protection Act [16 U.S.C. §§1361, 1362, 1371-1384, 1401-1407; 50 CFR §217.22].

Department of Defense

The Army Corps of Engineers issues permits for placement of possible obstructions to navigation under the Rivers and Harbors Act of 1899 [33 U.S.C. §401 et seq., 40 CFR §209.120]. Its permit authority regarding the discharge of refuse into navigable waters under the Refuse Act [33 U.S.C. §407] has been superseded by the permit authority provided to the Environmental Protection Agency [33 U.S.C. §1342, 1345, 33 CFR §209.120(b)(4)]. The Corps also issues permits allowing the construction of dams or dikes across navigable waters [33 U.S.C. §401, 33 CFR §209.125], transportation of dredged material [33 U.S.C. §404, 33 CFR §209.120, 40 CFR §230], and regulates dumping of mud, one-man stone, steam

ashes, clean soil, derrick stone, sewage sludge, wrecks and waste acid [33 U.S.C. §441, 33 CFR Part 205].

The Corps also conducts extensive dredging and flood control work [33 U.S.C. 709, 33 CFR Part 208, 33 CFR Part 341], which could obviously lead to major repercussions within the coastal zone.

The Army itself obviously has extensive land holdings in the form of military installations, including West Point. Although CZMA specifically excludes federal lands (16 U.S.C. §1453(1)], the "consistency" requirements of CZMA will apply to federal actions on excluded lands which affect or directly affect the coastal zone [16 U.S.C. §1456(c)(1) and (2)].

Department of Interior

The Department of Interior has extensive environmental responsibilities, and many of them relate directly to matters of concern in the Coastal Zone. Acting through the Fish and Wildlife Service, the Department has jurisdiction over national conservation and wildlife programs, endangered and threatened species of fish and wildlife, migratory birds, wilderness preservation and management and endangered and threatened plants, among others [50 U.S.C. Parts 1-91]. The Bureau of Land Management manages public lands, including national forests [43 CFR §§2230, 2890, 3560, 3820] and offshore oil and gas fields [43 CFR Parts 2880, 300, 3100-3130,

3300], and conducts geological and geophysical research [43 CFR §3040], discussed supra.

Department of Transportation

The Coast Guard has jurisdiction over deepwater ports [33 U.S.C. §1503(a), 33 CFR Parts 148-150] and navigational safety [14 U.S.C. §§81, 86, 92, 633, 33 CFR Parts 60-76], and other juridictions discussed, supra, including oil spill cleanup and removal [40 CFR Part 1510], regulations of marine sanitation devises [33 CFR, Part 159], regulation of ballast discharge [33 CFR §§155.370-155.390] and regulation of bilge slops [33 CFR §§155.340-155.360] and vessel design and operation [33 CFR Part 155].

The Materials Transportation Bureau regulates transportation of hazardous materials [49 CFR Parts 102-107], and the Office of Pipeline Safety establishes safety and design standards for oil and gas pipelines [49 U.S.C. §§1671-1672, 49 CFR Parts 170, 191, 192].

The Federal Aviation Administration regulates siting and standards for airports [14 CFR Parts 139, 151, 152], and the Federal Highway Administration sets national highway standards for highway and bridge construction, provides federal assistance to state highway departments for the construction of interstate, state and local highways and bridges [23 CFR, Parts 1-820, 40 CFR Parts 301-398].

Environmental Protection Agency

EPA has broad environmental protection responsibilities which relate to coastal zone management, including: development of national primary and secondary ambient air quality standards [40 CFR Part 120], administration of the National Pollutant Discharge Elimination System, discussed supra, supervision of water quality management plans [40 CFR Part 131], pesticide regulation [40 CFR Parts 162-180], noise abatement programs [40 CFR Parts 201-210], ocean dumping discussed supra [40 CFR Parts 220-230], and solid waste management [40 CFR Parts 240-247]. EPA also has inland waters responsibility for oil spills [40 CFR §1510] and works with the Coast Guard in assessing the environmental consequences of oil spills [Id.]. EPA either issues or is involved in a variety of permits, including ocean dumping, supra, discharges into navigable waters, supra, NPDES [40 CFR Part 125], and air, supra.

Federal Power Commission

The FPC sites natural gas pipelines [15 U.S.C. §717f, 18 CFR §157], licenses hydroelectric projects [16 U.S.C. §797(e), 18 CFR Part 4], as well as setting rates for natural gas which utilizes pipelines [15 U.S.C. §717d].

Federal Energy Administration

The Federal Energy Administration is charged with

developing a comprehensive energy policy, coordinating with the Secretary of State the integration of domestic and foreign policies relating to energy resource management, developing plans and programs for dealing with energy production shortages, and developing effective arrangements for the participation of State and local governments in the resolution of energy problems, among other responsibilities [15 U.S.C. §764, 10 CFR Parts 202-661].

Interstate Commerce Commission

The ICC regulates oil pipelines in that it sets the rates [49 U.S.C. §1, 40 CFR Part 1300] for oil utilizing those pipelines.

Consistency requirements

The consistency requirements found in the CZMA represent an innovative attempt to provide states with a long-term incentive so that they will manage their coastal zones in a manner which is as uniform nationwide as possible. After the federal funding program for "program development" grants [16 USC §1454] and "program administration" grants [16 USC §1455] (which represent a traditional form of incentive) expire, the consistency requirements of CZMA will remain, assuming states have utilized their grants to develop an "approved" program [16 USC §1456].

The consistency requirements apply even to federal actions occurring on federal lands, so long as the activities being conducted or supported by the federal agency directly affect the coastal zone (16 USC §1456(a)(1)] or the development project being undertaken by the federal agency occurs in the coastal zone [16 USC §1456 (c)(2)]. States which disagree with a federal agency's assessment of whether a particular activity affects the coastal zone or is consistent to the maximum extent practicable with that state's approved CZM program have three remedies: (1) negotiate informally, (2) seek mediation via the Secretary of Commerce, or (3) initiate litigation [16 USC §1456(h)].

An especially important implication of the consistency requirements is that OCS leases are activities or projects under 16 USC §1456(c)(1) and (2), and thus the decision as to which tracts should be offered for sale is subject to the consistency requirements. Although this does not mean that States will have an "environmental veto" over OCS leasing in their relevant areas, the provision does add strength to the state's advisory role.

It is important to note, however, that the significance of the consistency requirements can be greatly lessened by (1) a state's delay in commenting so that the state's consent to a license or permit proposed to be issued by a federal agency is conclusively presumed, (2) the Secretary of Commerce finds that the activity is consistent with the

CZMA, or (3) the activity is necessary in the interest of national security [16 USC §1456(c)(3)]. It seems obvious that the national security exception will play an especially relevant role regarding OCS.

Discussion

The issues surrounding management of energy resources and facilities are major ones for OCS and CZM programs. Because of a variety of factors, energy facilities are uniquely suited to being sited within the coastal zone, or so near thereto as to seriously affect the coastal zone. Power plants require huge amounts of water, either to drive the turbines (hydroelectric, over which the Federal Power Commission has licensing jurisdiction) or to cool the generators (fossil-fuel fired or nuclear-fired steam generating plants, over the latter of which the Nuclear Regulatory Commission has siting and safety standard regulatory jurisdiction), and thus will play an important role, and the exploration, development and production of energy resources located on the Continental Shelf will have a major impact on the coastal zone. Thus, those federal agencies which deal with energy issues will have a strong impact on the coastal zone.

Other agencies which will be heavily involved in a coastal zone program include the Army Corps of Engineers (because of its major flood control and water-related

responsibilities), the Coast Guard (because of its role in oil spill cleanup, tanker safety and design standards, and deepwater port responsibilities), the Environmental Protection Agency (because of its comprehensive mandate), the Department of Commerce (because of its role in fostering development and administering the CZM program), and the Department of Interior (because of the roles played by the Bureau of Land Management and the United States Geological Survey).

Although the CZMA contains language which appears to recognize the importance and the difficulty of coordinating federal activities relevant to CZM and OCS (via the CEIP mechanism) with other federal activities [see 16 U.S.C. §1456] and with state activities, implementation of that language is extremely difficult because of the sheer numbers of federal and state agencies involved. Discussions with and papers prepared by federal agencies indicate a misunderstanding of the implications of the consistency requirement. The lengthy process involved in developing federal regulations which clarify the statutory consistency provisions can do much to make federal as well as state agencies aware of the importance of this new approach. Coordination is a major issue throughout the OCS and CZM programs, regardless of the existence of specific statutory consistency requirements, because of the multitude of agencies involved and their overlapping and often conflicting mandates. Adding to

this problem are the uncertainties over pending federal and state oil spill liability legislation (which may or may not deal with OCS oil separately and which may preempt state action), pending amendments to the Outer Continental Shelf Lands Act of 1953 (which could strongly revamp the earlier law by providing for a stronger state role, expand the available leasing arrangements in order to encourage experimentation and ascertainment of the best leasing arrangements, and perhaps provide for an exploratory role to be played by the national government), and the delay in proposing consistency regulations.